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No. 597

In the Supreme Court of the United States

OCTOBER TERM, 1959

JOSE MONTALVO, WILLIAM ROVIRA AND ROSE ROVIRA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (R. II, 92–101; Pet. App. 19–29) [1] is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 1959 (R. II, 102; Pet. App. 33–34). A petition for rehearing (R. II, 104–113) was denied on December 2, 1959 (R. II, 121). The petition for a writ of certiorari was filed on December 17, 1959. The

[1] Appellant's appendix is Volume I and will be referred to as "R. I"; appellee's appendix is Volume II and will be referred to as "R. II".

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether evidence relating to a certain key found in petitioner Montalvo's apartment was improperly admitted because the location of the key was disclosed in a confession which the court ordered suppressed at the trial.

2. Whether petitioners were entitled to judgments of acquittal on the ground that the circumstances were not such as to exclude every reasonable hypothesis except that of guilt.

3. Whether a penknife caked with heroin found on the person of petitioner William Rovira at the time of his arrest was admissible in evidence against him.

4. Whether a motion to suppress heroin as evidence, made during the trial, was properly denied as untimely.

5. Whether the trial court gave a proper charge as to the statutory presumption of guilt arising from the unexplained possession of narcotics.

6. Whether the court erred in charging that, if the jurors found that two of the petitioners had made false exculpatory statements, these statements could be considered as independent circumstantial evidence of a consciousness of guilt.

STATEMENT

Petitioners were charged in count 1 of an indictment returned in the United States District Court for the Southern District of New York with receiv-

ing, possessing, concealing and facilitating the transportation and concealment of heroin illegally imported, in violation of 21 U.S.C. 173 and 174, and in count 2 with conspiracy to violate these sections (R. I, 5–6). The jury found them guilty on both counts (R. I, 2). Petitioner William Rovira, who had previously been convicted of a narcotics offense, was sentenced to concurrent terms of imprisonment for 12 years (R. I, 3, 153–154). Petitioners Rose Rovira and Montalvo were given concurrent sentences of 5 years (R. I, 3, 155–158). On appeal, the convictions were unanimously affirmed (R. I, 4; Pet. App. 33–34).

Pertinent evidence adduced at the trial may be summarized as follows:

Federal narcotics agents had been told, at about 1:30 p.m., on September 19, 1958, by a special employee named Morales that at about 5:00 p.m. petitioners William and Rose Rovira would meet a man named Victor, an alias for petitioner Montalvo (R. I, 86), at their home, go to the Bronx to pick up some heroin, and that Victor would carry the heroin to an apartment at 11 West 73rd Street in order to cut it up (R. I, 94, 95, 72–73). On the same day, at about 6:00 p.m., the agents observed Montalvo and William and Rose Rovira, who were not carrying any articles at the time, leave the Rovira home (R. II, 2–4). After walking to a garage, the three drove off in a Dodge car with Rovira at the wheel (R. II, 4). Rose went into a butcher shop for a few minutes, but returned empty-handed about five minutes later (R. II, 22). Petitioners then drove to a housing project where Rose, still carrying nothing, again stepped out

of the car (R. II, 5, 22). A few minutes later, Rose walked toward the Dodge, and the agents saw that she had in her hand a brown paper bag about 8 inches long, 4 inches high, and 4 inches wide. The neck of the bag had been rolled down to serve as a handle (R. II, 23–24).

After Rose entered the Dodge, which drove off, Rovira signalled for a taxicab (which was being driven by a government agent). Rose gave the paper bag to William Rovira, who passed it to Montalvo, who left the Dodge to enter the taxicab. The agent stated that this bag was about 9 inches long, 4 inches wide, and 5 inches high, and that its top was rolled down tight to form a handle (R. II, 6–7, 17).

Montalvo instructed the agent-driver to proceed to 11 West 73rd Street. The agent told Montalvo that he would stop at a drugstore to telephone his wife, but, instead, he called the Bureau of Narcotics office (R. II, 7–8). After the driver returned to the taxicab and Montalvo later alighted, agents saw him enter 11 West 73rd Street and go into apartment 1A with the paper bag in his hand (R. II, 9, 11, 30, 51–52). When Montalvo left the apartment 15 minutes later he was no longer carrying the paper bag (R. II, 11, 52). Two agents questioned Montalvo, who stated that he was on his way to meet a girl and denied that he had come from the apartment at 11 West 73rd Street. The agents arrested Montalvo, searched him, and brought him back to the apartment (R. II, 30–32, 47–48). The agents made an unsuccessful search of the apartment for the brown paper bag (R. II, 32, 12). Montalvo tried to convince the agents that a

piece of brown paper in which he wrapped some shirts was the package he had been carrying, but the shirt package was bulkier and different in other respects from the paper bag identified by the agents (R. II, 44–46).

While the search of the apartment continued, Montalvo's landlady unlocked an outer street door leading to the basement, and an agent searched the fireway stairs and the basement (R. II, 33–34). When the landlady and the agent returned to the apartment, she asked for Montalvo's key to the fire door leading to the rear stairway, and he said that it was lost (R. II, 36–37, 57). The agents then returned to the basement and, at about 10:45 p.m., discovered a brown paper bag containing heroin hidden in a closet over a steam pipe (R. II, 37–38; R. I, 104–106). The agents identified this bag as being similar in size and appearance to the one which Rose had been observed carrying (R. II, 9–10, 26). The agents obtained the key to the fire door in a roll of toilet paper located in Montalvo's bathroom (R. I, 69).[2] Using the key, an agent returned to the basement through the rear door. In the same closet where the brown bag had been discovered, he found a shirt sleeve containing more heroin and narcotic paraphernalia, including a stapler, staples, glassine envelopes, and mannite, an adulterant used in the preparation of heroin (R. II, 41–42).

[2] The agents obtained a written confession from Montalvo, but the court sustained a motion to suppress it, although it did permit testimony that the agent obtained the key (R. I, 33–36, 52–53).

At about 11:15 p.m., William Rovira drove by 11 West 73rd Street in the same Dodge car he had been seen driving earlier. On several occasions the car slowed down, Rovira looked at the building, and then drove away (R. II, 13, 27–28). Some 15 minutes later, the agents saw Rovira's Dodge parked near a drug store which Rovira and special employee Morales had entered. The agents took Rovira into custody. When asked by an agent where he had come from, Rovira's reply was that he had come straight from home to the drug store to buy medicine for his asthma (R. II, 42–43). Upon being transported to the apartment at 11 West 73rd Street and confronted with Montalvo, Rovira stated that he had never seen Montalvo before and that he did not know him (R. II, 14, 49). At the apartment, in searching Rovira, the agents found in his trouser pocket a penknife caked with a white powder which proved to be heroin (R. II, 15–16; R. I, 106–107).

At about midnight, the agents went with Rovira to his apartment at 46 West 83rd Street where Rose Rovira was taken into custody. When questioned as to what she had done that day, Rose answered that she and her husband had gone to the Bronx for a visit and had picked up a friend of her husband whom she did not know (R. II, 43–44, 50, 58–59). Rose stated that she did not know Montalvo (R. II, 50). The following morning, at the United States Attorney's office, William and Rose Rovira again denied that they knew Montalvo (R. II, 54, 59–60).

Montalvo testified that he had known William and Rose Rovira for about one year, and that he was with

them on September 19, 1958 (R. II, 77, 78; R. I, 123–127). He denied that he had hidden a brown paper bag containing narcotics in his basement or that he had ever received narcotics from anyone (R. II, 77).

ARGUMENT

1. Petitioners contend that the court erred in permitting testimony of agent Thomas J. Dugan that he found Montalvo's key to the fire door, arguing that this was part of the confession which the court had excluded (Pet. 8–11). Montalvo's counsel had suggested that evidence as to the key would be inadmissible (as well as the confession itself) but the court had decided against this (R. I, 48–53). This colloquy later ensued (R. I, 68–69):

> Mr. MITCHELL [Montalvo's counsel]. Your Honor, we now come to the point which I said this morning I wanted a chance to check on because I think if my theory is correct, even the finding of the key would be inadmissible for the reason that it would be part of a so-called confession.
>
> The COURT. It is not part of the confession.
>
> Mr. MITCHELL. No, but it would be.
>
> Mr. KOVE [counsel for the Roviras]. The fruits——
>
> Mr. MITCHELL. No, not the fruits. That is entirely different. I say that the act is the same as words and it would constitute an admission.
>
> The COURT. But if we leave Montalvo out of it there is no act which involves Montalvo.

> Mr. MITCHELL. But without the act of Montalvo which is inadmissible, the key would not have been found.
>
> The COURT. We don't tell that to the jury.
>
> Mr. MITCHELL. Of course, we can't.
>
> The COURT. This story will be exactly like the story of the finding of the paper bag in the cellar. He just finds the key.

Agent Dugan then went on to testify, without objection by counsel, that he found the key in a roll of toilet paper in the bathroom (R. I, 69). The government did not attempt to introduce the key itself in evidence (R. II, 75).

It thus appears, as the court below held (Pet. App. 27), that Montalvo's counsel obtained what he asked. In the court of appeals' words (*ibid.*):

> * * * careful examination of the transcript convinces us that Montalvo's trial counsel objected only to the admission of the key, which the government ultimately decided not to offer, and to testimony by the agent that Montalvo accompanied him in the search of the bathroom, which the trial judge excluded, and that, with any reference to Montalvo thus eliminated, counsel acquiesced in the agent's being allowed to testify to the discovery of the key. Having acquiesced in the trial judge's ruling, Montalvo may not challenge it on appeal, *United States* v. *Easterday*, 57 F. 2d 165 (2d Cir. 1932). Trial counsel for the other defendants likewise made no objection, and these defendants therefore may not do so now, even if they had standing. Cf. *Goldstein* v. *United States*, 316 U.S. 114, 121 (1942).

2. Petitioners argue that, since the brown paper bag containing heroin and the shirt sleeve containing heroin and narcotics paraphernalia might have been placed in the closet by a person other than Montalvo, the circumstantial evidence was insufficient to exclude every reasonable hypothesis save that of guilt (Pet. 12–14). Petitioners obtained as favorable an instruction as was their due when the court charged (R. I, 145–146):

> In order to justify a jury in finding a verdict of guilty based on circumstances the facts and circumstances must not only be consistent with each other, and with the guilt of the defendants, but they must be inconsistent beyond a reasonable doubt with any reasonable theory of the defendants' innocence. If you find that any circumstance relied on as incriminating is susceptible of two constructions or interpretations, each of which appears to be reasonable, and one of which points to the guilt of the defendant and the other to his innocence, it is your duty under the law to adopt that interpretation which will admit of the defendant's innocence and reject that which points to his guilt. No conviction can be based upon suspicion or conjecture, however strong.

The precept relating to the hypothesis of guilt calls for an appropriate instruction to the jury; it does not fix the standard of appellate review. Cf. *Holland* v. *United States*, 348 U.S. 121, 139–140. See also *Curley* v. *United States*, 160 F. 2d 229 (C.A. D.C.), certiorari denied, 331 U.S. 837; *Stoppelli* v. *United States*, 183 F. 2d 391 (C.A. 9), certiorari denied, 340 U.S. 864.

Where the evidence is such that reasonable minds might fairly conclude guilt beyond a reasonable doubt, it is the jury's function to make the ultimate determination.

There was strong circumstantial evidence that the paper bag had been placed in the basement closet by Montalvo. It had been handled by all three petitioners, and the agents had seen Montalvo take it into his apartment a short time before it was discovered in the search. Even though none of the petitioners had been observed taking the shirtsleeve with the narcotics paraphernalia into the building, the jury could reasonably infer that Montalvo had placed it in the same basement closet where the heroin was secreted, so that they would both be accessible at the time when the heroin would be cut.[3] The jury could also infer that William Rovira had been awaiting a signal that the "coast was clear" when he was seen stopping in his car and observing Montalvo's apartment.

3. There was no error resulting from the introduction of the penknife caked with heroin, taken from William Rovira's person after his arrest (see Pet. 14). In view of their observation of Rovira's complicity in delivery of the paper bag to Montalvo's apartment, their discovery that the bag contained heroin, and Rovira's later suspicious surveillance of the apartment, the agents had reasonable grounds for believing that he had committed a narcotics offense.

[3] The paraphernalia for adulteration of heroin was admissible as relevant to the conspiracy charge. *United States* v. *Allen*, 267 F. 2d 491, 492 (C.A. 2); *United States* v. *Volkell*, 251 F. 2d 333, 336 (C.A. 2), certiorari denied, 356 U.S. 962.

His arrest without a warrant was proper, pursuant to 26 U.S.C. 7607(2). *Draper* v. *United States*, 358 U.S. 307; *United States* v. *Walker*, 246 F. 2d 519, 525–526 (C.A. 7); *United States* v. *Kancso*, 252 F. 2d 220, 222–223 (C.A. 2). The penknife found in the search of his person—an incident to the valid arrest—was an article adaptable to the cutting of heroin. It was admissible as tending to show Rovira's intent to cut and adulterate the heroin in Montalvo's apartment. Cf. II Wigmore on Evidence (3d ed.) §§ 300–304; *United States* v. *Dornblut*, 261 F. 2d 949, 951 (C.A. 2), certiorari denied, 360 U.S. 912; *United States* v. *Herskovitz*, 209 F. 2d 881, 885 (C.A. 2). The admissibility of this relevant evidence was not affected by its inadmissibility for the purpose (for which it was not offered) of showing that Rovira had committed a previous narcotics offense. See I Wigmore on Evidence (3d ed.) §§ 215, 216.

The other petitioners, Rose Rovira and Montalvo, are in no position to complain as to admission of the penknife and its contents since the court carefully instructed that these items could be used "only in considering the case of the defendant William Rovira" (R. I, 143, 121). It must be presumed that the jury followed this clear and simple instruction. *Opper* v. *United States*, 348 U.S. 84, 95; *Delli Paoli* v. *United States*, 352 U.S. 232, 242–243.

4. Petitioners contend that the trial court erred in overruling as untimely their motions to suppress as evidence the heroin found by the agents (Pet. 15–16).[4]

[4] These rulings appear, as to Montalvo, at R. I, 26–32 and, as to the Roviras, at R. I, 38–48.

Petitioners had ample time to bring the motion before trial. They knew, from the time of their arrest, that the bag and shirtsleeve had been seized. They pleaded not guilty to the indictments on October 30, 1958, and their attorneys entered appearances by the following day. The trial did not begin until almost three months later on January 8, 1959 (R. I, 1, 2). In these circumstances, the trial judge cannot be said to have abused the discretion conferred upon him by Rule 41(e) in denying the motions as untimely. *United States* v. *Volkell*, 251 F. 2d 333, 336 (C.A. 2), certiorari denied, 356 U.S. 962; *United States* v. *Romero*, 249 F. 2d 371, 374 (C.A. 2); *United States* v. *Sheba Bracelets*, 248 F. 2d 134, 142 (C.A. 2), certiorari denied, 355 U.S. 904; and see *Segurola* v. *United States*, 275 U.S. 106, 111–112; *Nardone* v. *United States*, 308 U.S. 338, 341–342.

Moreover, it is apparent, on the face of it, that there would be no basis for suppressing the evidence on the theory of an illegal search and seizure. The heroin was found in the basement of the apartment house, not in Montalvo's apartment, and the search of the basement was conducted with the knowledge and permission of the landlady.

5. Petitioners argue that the charge relating to the statutory presumption under 21 U.S.C. 174 (Pet. App. 30–31), *i.e.*, that possession of narcotics shall be sufficient evidence to authorize a conviction unless the defendant explains the possession to the satisfaction of the jury, was erroneous because the court did not state that the presumption applies only where the defendant had knowledge that what he possessed was

narcotics (Pet. 16–17). This argument is not available since it is raised here for the first time. Under Rule 30, F. R. Crim. P., objection to an omission from the charge must be made before the jury retires. The claim is in any event without merit.

In its charge (R. I, 135), the court quoted directly from 21 U.S.C. 174, requiring that the proscribed acts be done "knowingly." Following this, the court stated that the acts had to be performed with the defendant "knowing" that the narcotic drug had been imported contrary to law. The court then read the statutory presumption provision, and followed it with this charge (R. I, 135):

> That means that if it is in his possession, he has to explain that it came to him legally. Without that explanation the jury would be authorized to find that he, the defendant who did not so explain, had violated the statute with respect to *knowingly* dealing with illegally imported narcotics. [Emphasis added.]

The charge as given was correct. Cf. *United States* v. *Kronenberg*, 134 F. 2d 483, 484 (C.A. 2); *Biegler* v. *United States*, 86 F. 2d 41, 42 (C.A. 7), certiorari denied, 300 U.S. 677. When read as a whole, it adequately informed the jury that in order to convict it was necessary for them to find that petitioners had knowledge that what they possessed was narcotics.

6. There was no error in the following portion of the court's charge (see Pet. 17–18) (as to which, again, there was no objection (R. I, 146)):

> If you find that the defendants William Rovira and Rose Rovira made false exculpatory

> statements when they denied knowing their co-defendant Jose Montalvo, you may consider these statements as independent evidence of guilt. Exculpatory statements such as those the defendants are said to have made upon interrogation when shown to be false are circumstantial evidence of a guilt consciousness and have independent probative value.

See *United States* v. *Farina*, 218 F. 2d 62, 63 (C.A. 2); *United States* v. *Smolin*, 182 F. 2d 782, 786 (C.A. 2); II Wigmore on Evidence (3d ed.) § 278. The court's instruction did not permit a finding of guilty on the basis of the falsity of the exculpatory statements alone, as petitioners seem to state in urging that *Opper* v. *United States*, 348 U.S. 84, implicitly holds that false exculpatory statements cannot constitute proof of guilt. Rather, the instruction allowed the jury merely to consider these exculpatory statements as circumstantial evidence of a guilt consciousness and as having independent probative value which warranted consideration together with "all the evidence" (see R. I, 133).[5]

[5] The evidence against petitioners, apart from the false exculpatory statements, was amply sufficient to support their convictions.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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